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[Report No. 106–159]

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 10, 1999

Mr. THOMPSON (for himself, Mr. LEVIN, Mr. VOINOVICH, Mr. ROBB, Mr. COCHRAN, Mrs. LINCOLN, Mr. ENZI, Mr. BREAUX, Mr. ROTH, Mr. BAYH, Mr. DOMENICI, Ms. COLLINS, Mr. THOMAS, and Mr. ABRAHAM) introduced the following bill; which was read twice and referred jointly pursuant to the order of August 4, 1977, to the Committees on the Budget and Governmental Affairs, with instructions that if one committee reports, the other committee have thirty days to report or be discharged

SEPTEMBER 16, 1999

Reported by Mr. THOMPSON, with amendments

SEPTEMBER 16, 1999

Referred to the Committee on the Budget for a period not to exceed thirty calendar days

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federalism Account-
5 ability Act of 1999”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

8 (1) the Constitution created a strong Federal
9 system, reserving to the States all powers not dele-
10 gated to the Federal Government;

11 (2) preemptive statutes and regulations have at
12 times been an appropriate exercise of Federal pow-
13 ers, and at other times have been an inappropriate
14 infringement on State and local government author-
15 ity;

16 (3) on numerous occasions, Congress has en-
17 acted statutes and the agencies have promulgated
18 rules that explicitly preempt State and local govern-
19 ment authority and describe the scope of the pre-
20 emption;

21 (4) in addition to statutes and rules that explic-
22 itly preempt State and local government authority,
23 many other statutes and rules that lack an explicit
24 statement by Congress or the agencies of their in-
25 tent to preempt and a clear description of the scope

1 of the preemption have been construed to preempt
2 State and local government authority;

3 (5) in the past, the lack of clear congressional
4 intent regarding preemption has resulted in too
5 much discretion for Federal agencies and uncer-
6 tainty for State and local governments, leaving the
7 presence or scope of preemption to be litigated and
8 determined by the judiciary and sometimes pro-
9 ducing results contrary to or beyond the intent of
10 Congress; and

11 (6) State and local governments are full part-
12 ners in all Federal programs administered by those
13 governments.

14 **SEC. 3. PURPOSES.**

15 The purposes of this Act are to—

16 (1) promote and preserve the integrity and ef-
17 fectiveness of our Federal system of government;

18 (2) set forth principles governing the interpre-
19 tation of congressional and agency intent regarding
20 preemption of State and local government authority
21 by Federal laws and rules;

22 (3) establish an information collection system
23 designed to monitor the incidence of Federal statu-
24 tory, regulatory, and judicial preemption; and

1 (4) recognize the partnership between the Fed-
2 eral Government and State and local governments in
3 the implementation of certain Federal programs.

4 **SEC. 4. DEFINITIONS.**

5 In this Act the definitions under section 551 of title
6 5, United States Code, shall apply and the term—

7 (1) “local government” means a county, city,
8 town, borough, township, village, school district, spe-
9 cial district, or other political subdivision of a State;

10 (2) “public officials” means elected State and
11 local government officials and their representative
12 organizations;

13 (3) “State”—

14 (A) means a State of the United States
15 and an agency or instrumentality of a State;

16 (B) includes the District of Columbia and
17 any territory of the United States, and an agen-
18 cy or instrumentality of the District of Colum-
19 bia or such territory;

20 (C) includes any tribal government and an
21 agency or instrumentality of such government;
22 and

23 (D) does not include a local government of
24 a State; and

1 (4) “tribal government” means an Indian tribe
2 as that term is defined under section 4(e) of the In-
3 dian Self-Determination and Education Assistance
4 Act (25 U.S.C. 450b(e)).

5 **SEC. 5. COMMITTEE OR CONFERENCE REPORTS.**

6 (a) IN GENERAL.—The report accompanying any bill
7 or joint resolution of a public character reported from a
8 committee of the Senate or House of Representatives or
9 from a conference between the Senate and the House of
10 Representatives shall contain an explicit statement on the
11 extent to which the bill or joint resolution preempts State
12 or local government law, ordinance, or regulation and, if
13 so, an explanation of the reasons for such preemption. In
14 the absence of a committee or conference report, the com-
15 mittee or conference shall report to the Senate and the
16 House of Representatives a statement containing the in-
17 formation described in this section before consideration of
18 the bill, joint resolution, or conference report.

19 (b) CONTENT.—The statement under subsection (a)
20 shall include an analysis of—

21 (1) the extent to which the bill or joint resolu-
22 tion legislates in an area of traditional State author-
23 ity; and

1 (2) the extent to which State or local govern-
 2 ment authority will be maintained if the bill or joint
 3 resolution is enacted by Congress.

4 **SEC. 6. RULE OF CONSTRUCTION RELATING TO PREEMP-**
 5 **TION.**

6 (a) STATUTES.—No statute enacted after the effec-
 7 tive date of this Act shall be construed to preempt, in
 8 whole or in part, any State or local government law, ordi-
 9 nance, or regulation, unless—

10 (1) the statute explicitly states that such pre-
 11 emption is intended; or

12 (2) there is a direct conflict between such stat-
 13 ute and a State or local law, ordinance, or regulation
 14 so that the two cannot be reconciled or consistently
 15 stand together.

16 (b) RULES.—No rule promulgated after the effective
 17 date of this Act shall be construed to preempt, in whole
 18 or in part, any State or local government law, ordinance,
 19 or regulation, unless—

20 (1)(A) such preemption is authorized by the
 21 statute under which the rule is promulgated; and

22 (B) the rule, in compliance with section 7, ex-
 23 plicitly states that such preemption is intended; or

24 (2) there is a direct conflict between such rule
 25 and a State or local law, ordinance, or regulation so

1 that the two cannot be reconciled or consistently
2 stand together.

3 ~~(c) FAVORABLE CONSTRUCTION.—Any ambiguities~~
4 ~~in this Act, or in any other law of the United States, shall~~
5 ~~be construed in favor of preserving the authority of the~~
6 ~~States and the people.~~

7 **SEC. 7. AGENCY FEDERALISM ASSESSMENTS.**

8 (a) IN GENERAL.—The head of each agency shall—

9 (1) be responsible for implementing this Act;

10 and

11 (2) designate an officer (to be known as the
12 federalism officer) to—

13 (A) manage the implementation of this
14 Act; and

15 (B) serve as a liaison to State and local of-
16 ficials and their designated representatives.

17 (b) NOTICE AND CONSULTATION WITH POTEN-
18 Tially AFFECTED STATE AND LOCAL GOVERNMENT.—

19 Early in the process of developing a rule and before the
20 publication of a notice of proposed rulemaking, the agency
21 shall notify, consult with, and provide an opportunity for
22 meaningful participation by public officials of governments
23 that may potentially be affected by the rule for the pur-
24 pose of identifying any preemption of State or local gov-
25 ernment authority or other significant federalism impacts

1 that may result from issuance of the rule. If no notice
2 of proposed rulemaking is published, consultation shall
3 occur sufficiently in advance of publication of an interim
4 final rule or final rule to provide an opportunity for mean-
5 ingful participation.

6 (c) FEDERALISM ASSESSMENTS.—

7 (1) IN GENERAL.—In addition to whatever
8 other actions the federalism officer may take to
9 manage the implementation of this Act, such officer
10 shall identify each proposed, interim final, and final
11 rule having a federalism impact, including each rule
12 with a federalism impact identified under subsection
13 (b), that warrants the preparation of a federalism
14 assessment.

15 (2) PREPARATION.—With respect to each such
16 rule identified by the federalism officer, a federalism
17 assessment, as described in subsection (d), shall be
18 prepared and published in the Federal Register at
19 the time the proposed, interim final, and final rule
20 is published.

21 (3) CONSIDERATION OF ASSESSMENT.—The
22 agency head shall consider any such assessment in
23 all decisions involved in promulgating, implementing,
24 and interpreting the rule.

1 (4) SUBMISSION TO THE OFFICE OF MANAGE-
2 MENT AND BUDGET.—Each federalism assessment
3 shall be included in any submission made to the Of-
4 fice of Management and Budget by an agency for re-
5 view of a rule.

6 (d) CONTENTS.—Each federalism assessment shall
7 include—

8 (1) a statement on the extent to which the rule
9 preempts State or local government law, ordinance,
10 or regulation and, if so, an explanation of the rea-
11 sons for such preemption;

12 (2) an analysis of—

13 (A) the extent to which the rule regulates
14 in an area of traditional State authority; and

15 (B) the extent to which State or local au-
16 thority will be maintained if the rule takes ef-
17 fect;

18 (3) a description of the significant impacts of
19 the rule on State and local governments;

20 (4) any measures taken by the agency, includ-
21 ing the consideration of regulatory alternatives, to
22 minimize the impact on State and local governments;
23 and

24 (5) the extent of the agency's prior consultation
25 with public officials, the nature of their concerns,

1 and the extent to which those concerns have been
2 met.

3 (e) PUBLICATION.—For any applicable rule, the
4 agency shall include a summary of the federalism assess-
5 ment prepared under this section in a separately identified
6 part of the statement of basis and purpose for the rule
7 as it is to be published in the Federal Register. The sum-
8 mary shall include a list of the public officials consulted
9 and briefly describe the views of such officials and the
10 agency’s response to such views.

11 (f) JUDICIAL REVIEW.—

12 (1) IN GENERAL.—*Only a State or local govern-*
13 *ment, or its representative organization, that is ad-*
14 *versely affected or aggrieved by final agency action*
15 *under this section may file an action seeking judicial*
16 *review of compliance with this section.*

17 (2) LIMITATION OF REVIEW.—*Compliance by an*
18 *agency with this section shall be subject to judicial re-*
19 *view only—*

20 (A) *in connection with review of final agen-*
21 *cy action;*

22 (B) *in accordance with this subsection; and*

23 (C) *in accordance with the limitations on*
24 *timing, venue, and scope of review imposed by*
25 *the statute authorizing judicial review.*

1 (3) *AGENCY DETERMINATIONS.*—*Any determina-*
2 *tion of an agency whether a federalism assessment*
3 *shall be prepared under this section shall be set aside*
4 *by a reviewing court only upon a showing that the*
5 *determination is arbitrary or capricious based on in-*
6 *formation available at the time the agency made the*
7 *determination.*

8 (4) *OMB DETERMINATIONS.*—*Any determination*
9 *by the Director of the Office of Management and*
10 *Budget that a federalism assessment shall be prepared*
11 *under this section, or any failure to make such deter-*
12 *mination, shall not be subject to judicial review.*

13 (5) *FEDERALISM ASSESSMENT.*—*The federalism*
14 *assessment required under this Act shall not be subject*
15 *to judicial review separate from review of the final*
16 *rule to which it applies. The federalism assessment*
17 *shall be part of the rulemaking record and shall be*
18 *considered by a court to the extent relevant, only in*
19 *determining under the statute granting the rule-*
20 *making authority whether the final rule is arbitrary*
21 *or capricious, an abuse of discretion, or is unsup-*
22 *ported by substantial evidence where that standard is*
23 *otherwise provided by law.*

24 (6) *COURT ACTION.*—*If any agency fails to per-*
25 *form the federalism assessment or undertake any con-*

1 sultation, a court may, giving due regard to preju-
 2 dicial error, remand or invalidate the rule. The ade-
 3 quacy of compliance with the specific requirements of
 4 this section shall not otherwise be grounds for re-
 5 manding or invalidating a rule under this section. If
 6 the court allows the rule to take effect, the court shall
 7 order the agency to promptly perform the federalism
 8 assessment.

9 (g) *EMERGENCY EXEMPTION.*—

10 (1) *IN GENERAL.*—A rule may be adopted with-
 11 out prior compliance with this section if—

12 (A) the agency for good cause finds that
 13 conducting the federalism assessment under this
 14 section before the rule becomes effective is im-
 15 practicable or contrary to an important public
 16 interest; and

17 (B) the agency publishes the rule in the
 18 *Federal Register* with such finding and a suc-
 19 cinct explanation of the reasons for the finding.

20 (2) *COMPLIANCE.*—If a rule is adopted under
 21 paragraph (1), the agency shall comply with this sec-
 22 tion as promptly as possible unless the Director of the
 23 Office of Management and Budget determines that
 24 compliance would be clearly unreasonable.

1 **SEC. 8. PERFORMANCE MEASURES.**

2 Section 1115 of title 31, United States Code, is
3 amended by adding at the end the following:

4 ~~“(g) The head of an agency may not include in any~~
5 ~~performance plan under this section any agency activity~~
6 ~~that is a State-administered Federal grant program, un-~~
7 ~~less the performance measures for the activity are deter-~~
8 ~~mined in cooperation with public officials as defined under~~
9 ~~section 4 of the Federalism Accountability Act of 1999.”.~~

10 *“(g) When developing a performance plan under this*
11 *section that includes a State-administered Federal grant*
12 *program, the agency shall consult with public officials as*
13 *defined under section 4 of the Federalism Accountability*
14 *Act of 1999.”.*

15 **SEC. 9. CONGRESSIONAL BUDGET OFFICE PREEMPTION**
16 **REPORT.**

17 (a) OFFICE OF MANAGEMENT AND BUDGET INFOR-
18 MATION.—Not later than the expiration of the calendar
19 year beginning after the effective date of this Act, and
20 every year thereafter, the Director of the Office of Man-
21 agement and Budget shall submit to the Director of the
22 Congressional Budget Office information describing in-
23 terim final rules and final rules issued during the pre-
24 ceding calendar year that preempt State or local govern-
25 ment authority.

1 (b) CONGRESSIONAL RESEARCH SERVICE INFORMA-
 2 TION.—Not later than the expiration of the calendar year
 3 beginning after the effective date of this Act, and every
 4 year thereafter, the Director of the Congressional Re-
 5 search Service shall submit to the Director of the Congres-
 6 sional Budget Office information describing court deci-
 7 sions issued during the preceding calendar year that pre-
 8 empt State or local government authority.

9 (c) CONGRESSIONAL BUDGET OFFICE REPORT.—

10 (1) IN GENERAL.—After each session of Con-
 11 gress, the Congressional Budget Office shall prepare
 12 a report on the extent of Federal preemption of
 13 State or local government authority enacted into law
 14 or adopted through judicial or agency interpretation
 15 of Federal statutes during the previous session of
 16 Congress.

17 (2) CONTENT.—The report under paragraph
 18 (1) shall contain—

19 (A) a list of Federal statutes preempting,
 20 in whole or in part, State or local government
 21 authority;

22 (B) a summary of legislation reported from
 23 committee preempting, in whole or in part,
 24 State or local government authority;

1 (C) a summary of rules of agencies pre-
 2 empting, in whole or in part, State and local
 3 government authority; and

4 (D) a summary of Federal court decisions
 5 on preemption.

6 (3) AVAILABILITY.—The report under this sec-
 7 tion shall be made available to—

8 (A) each committee of Congress;

9 (B) each Governor of a State;

10 (C) the presiding officer of each chamber
 11 of the legislature of each State; and

12 (D) other public officials and the public on
 13 the Internet.

14 **SEC. 10. FLEXIBILITY AND FEDERAL INTERGOVERN-**
 15 **MENTAL MANDATES.**

16 (a) DEFINITION.—Section 421(5)(B) of the Congres-
 17 sional Budget Act of 1974 (2 U.S.C. 658(5)(B)) is
 18 amended—

19 (1) by striking “(i)(I) would” and inserting “(i)
 20 would”;

21 (2) by striking “(II) would” and inserting
 22 “(ii)(I) would”; and

23 (3) by striking “(ii) the” and inserting “(II)
 24 the”.

1 (b) COMMITTEE REPORTS.—Section 423(d) of the
 2 Congressional Budget Act of 1974 (2 U.S.C. 658b(d)) is
 3 amended—

4 (1) in paragraph (1)(C) by striking “and” after
 5 the semicolon;

6 (2) in paragraph (2) by striking the period and
 7 inserting “; and”; and

8 (3) by adding at the end the following:

9 “(3) if the bill or joint resolution would make
 10 the reduction specified in section 421(5)(B)(ii)(I), a
 11 statement of how the committee specifically intends
 12 the States to implement the reduction and to what
 13 extent the legislation provides additional flexibility, if
 14 any, to offset the reduction.”.

15 (c) CONGRESSIONAL BUDGET OFFICE ESTIMATES.—
 16 Section 424(a) of the Congressional Budget Act of 1974
 17 (2 U.S.C. 658c(a)) is amended—

18 (1) by redesignating paragraph (3) as para-
 19 graph (4); and

20 (2) by inserting after paragraph (2) the fol-
 21 lowing:

22 “(3) ADDITIONAL FLEXIBILITY INFORMA-
 23 TION.—The Director shall include in the statement
 24 submitted under this subsection, in the case of legis-

1 lation that makes changes as described in section
2 421(5)(B)(ii)(I)—

3 “(A) if no additional flexibility is provided
4 in the legislation, a description of whether and
5 how the States can offset the reduction under
6 existing law; or

7 “(B) if additional flexibility is provided in
8 the legislation, whether the resulting savings
9 would offset the reductions in that program as-
10 suming the States fully implement that addi-
11 tional flexibility.”.

12 **SEC. 11. EFFECTIVE DATE.**

13 This Act and the amendments made by this Act shall
14 take effect 90 days after the date of enactment of this
15 Act.

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